Having regard to all the circumstances we order that the respondent be suspended from practice for a period of six months and that he pays the costs here and before the committee.

Order accordingly.

Solicitors: *Spencer Gwee & Co*; *Leo Fernando*.

Reported by *PS Ranjan*

Mary Jer Pereira v The Attorney General

HIGH COURT (SINGAPORE) – ORIGINATING SUMMONS NO 265 OF 1985
THEAN J
9 SEPTEMBER 1988

Revenue Law – Estate duty – Gift made by deceased – Whether included in dutiable property of deceased – Donee not retaining bona fide possession and enjoyment of gift – Estate Duty Act (Cap 96, 1985 Ed), s 8(c)

Elias Philip Pereira ('the deceased') had purchased the land and premises known as No 218, Queen Street, Singapore ('the property') in August 1966 for the purpose of his business. On 27 December 1971, he admitted his son Eric into partnership in relation to two businesses, one under the name and style of 'City School of Commerce' and the other under the name and style of 'Stamford Centre for Executive and Commercial Training'. Since Eric's admission to the partnership the property had been treated as a partnership property by the partners. The property was used for the partnership businesses, namely, City School of Commerce-Department of Arts ('City School-Arts'), City School of Commerce-Department of Science, and Stamford Centre for Executive and Commercial Training. The profits from the businesses, including the rents, actual and imputed, were divided in the ratio of 60:40, ie 60% thereof to the deceased and 40% thereof to Eric.

In 1973, the deceased's daughter Shirley became a partner of the firm and was entitled to 25% of the profits of the partnership, and in consequence the shares of the deceased and Eric were reduced to 50% and 25% respectively. With effect from 1 January 1975, however, there was a change in the division of profits of the partnership. Shirley ceased to be entitled to share in the rentals from the property, which were then shared between the deceased and Eric in the ratio of 60% to the deceased and 40% to Eric. The profits from the businesses continued to be divided in the ratio of 50% to the deceased, 25% to Eric and 25% to Shirley.

The issue in the case was whether the 40% equitable interest in the property was liable to estate duty on the death of the deceased. The dispute was centred on the receipt of the rental income from the property as from 1975 onwards to the date of death of the deceased. The case of the plaintiff was that the rental income from the property was shared between the deceased and Eric in the ratio of 60:40. According to the group accountant to the various businesses carried on by the deceased as a sole proprietor and those carried on by him in partnership with his children, in respect of the year 1975 and subsequent years, the profits or rentals from the property were apportioned between the deceased and Eric in the ratio of 60:40 and the profits from the business City School-Arts were apportioned between the three partners, namely, the deceased, Eric and Shirley in the ratio of 50:25:25 and the respective entitlements of the partners were credited to their capital accounts each year, and these were written by him in pencil in the 'memorandum of capital account' in the ledger of each year.

Such accounting treatments of the profits or rentals from the property as reflected in the ledgers of City School-Arts were not borne out by the contemporaneous documents emanating from the deceased. In answer to a query from the Comptroller of Income Tax, the deceased wrote a letter dated 11 August 1976 in which he said, 'I confirm that I am the sole recipient of the rental with effect from 1 January 1975.' In his income tax returns for subsequent years of assessment, he declared the net rental income as his own income, and he was assessed to income tax on such income. Correspondingly, Eric in his return for the year of assessment 1976 and subsequent years omitted his share of rental income from the property, and consequently he was not assessed to tax on his share of rental income to which he claimed he was entitled.

In addition to the three partnership businesses, the deceased carried on two other businesses as a sole proprietor to one of which he had transferred large sums of money from the accounts of the three partnership businesses during the period 1973-77.

Held, the 40% equitable interest of the deceased's son in the property was dutiable:

(1) Under the provisions of s 8(c) of the Estate Duty Act, the conditions of liability to duty occur if the person taking the gift does not immediately upon the gift assume bona fide beneficial possession and enjoyment of such gift and thenceforward retain such possession and enjoyment to the entire exclusion of the donor of such gift or of the benefit to him by contract or otherwise.

(2) The deceased had during his lifetime treated the payment for the use and occupation of the respective parts of the property by the three partnership businesses as rents paid by the partnership and had also treated these rents and the rent from the basement as being received solely by him. He confirmed in no uncertain terms that he was the sole recipient of all these rents, and in consequence he was assessed to income tax on these rents and he paid tax thereon. Eric therefore had not during the period 1975 to the date of the death of the deceased retained bona fide possession and enjoyment of the 40% equitable interest in the property to the entire exclusion of the deceased. The deceased had unchallengeable control over the rental income from the property. He was master of the income as it was paid. He arrogated to himself the right to receive the whole of the income and, on his own unequivocal confirmation, did receive and use it.

(3) In the circumstances, the Commissioner of Estate Duties was fully justified in including the subject matter of the gift as parts of the dutiable estate of the deceased.

Cases referred to

1 *O'Connor* v *Commissioner of Succession Duties (South Australia)* (1932) 47 CLR 601 (folld)
2 *Commissioner of Stamp Duties of New South Wales* v *Permanent Trustee Co of New South Wales* [1956] AC 512 (folld)

Legislation referred to
Estate Duty Act (Cap 96, 1985 Ed) s 8(c)
Stamp Duties Act 1920-40 (New South Wales) [Aust], s 102(2)(d)
Succession Duties Act Further Amendment Act 1919 & 1923 (South Australia) [Aust], s 18(3)

Stewart Bates QC (*Alan Thambiayah* with him) for the plaintiff.

Loo Lian Ee (Miss) (*S Sharma* with her) for the Attorney General.

Cur Adv Vult

Thean J: The issue in this case is whether a 40% equitable interest in the land and premises known as No 218, Queen Street, Singapore ('the property') was liable to estate duty on the death of Elias Philip Pereira ('the deceased') on 2 July 1980 under s 8(c) of the Estate Duty Act (Cap 96, 1985 Ed).

The material facts which gave rise to the matter in dispute are these. Prior to his death, the deceased had for many years carried on several businesses: some as a sole proprietor and some in partnership with his children. In particular, he set up two businesses, one under the name and style of City School of Commerce and the other, Stamford Centre for Executive and Commercial Training. He carried on the business of City School of Commerce at the property with a branch at 169 Selegie Road and that of Stamford Centre for Executive and Commercial Training on the 15th floor, MAS Building, Robinson Road, Singapore.

The property was purchased by the deceased in August 1966 for $150,000 for the purpose of his businesses. In 1970, the old building comprised in the property was demolished and construction of a new multi-storey building commenced. While the construction was in progress, the deceased admitted his son Eric Sheldon Pereira ('Eric') into partnership in relation to the two businesses on 27 December 1971. The new multi-storey building was eventually completed in April 1972.

Since Eric's admission to partnership the property had been treated as partnership property by the partners. Upon the completion of the new building the partners resumed their businesses at the property. The partnership businesses carried on thereat were: (i) City School of Commerce-Department of Arts ('City School-Arts'), (ii) City School of Commerce-Department of Science ('City School-Science') and (iii) Stamford Centre for Executive and Commercial Training ('Stamford Centre'). For convenience I shall call these three heads or divisions of partnership business as 'the three partnership businesses'. The basement of the building was rented out to an unrelated third party for use as a cafeteria. The cost of construction of the new building was reflected as an asset in the accounts of the business of City School-Arts. As for the other two businesses, sums stated as rents were charged to their respective accounts and these were reflected as imputed rents in the accounts of City School-Arts. As the property was a partnership asset and was used for the partnership businesses there was really no question of any actual rents being paid by the partners themselves on accounts of these two businesses. The amounts were, in effect, notional rents for the purpose of determining the profits of these businesses. The rent paid by the tenant of the basement – that was the actual rent – was credited to the account of City School-Arts. The profits from the businesses, including the rents, actual and imputed, were divided in the ratio of 60:40, ie 60% thereof to the deceased and 40% thereof to Eric.

In 1973, under an oral agreement, the deceased's daughter, Shirley Pereira ('Shirley') became a partner of the firm and was entitled to 25% of the profits of the partnership, and in consequence the shares of the deceased and Eric were reduced to 50% and 25% respectively. It appears that until 31 December 1974, Shirley was also entitled to share in the rentals from the property in the same proportion, ie 25% to her, 50% to the deceased, 25% to Eric.

However, with effect from 1 January 1975, there was a change in the division of the profits of the partnership. Shirley ceased to be entitled to share in the rentals from the property, which were then shared between the deceased and Eric in the ratio of 60% to the deceased and 40% to Eric. The profits from the businesses continued to be divided in the ratio of 50% to the deceased, 25% to Eric and 25% to Shirley. A building account was created, and each of the three partnership businesses was charged a rent, and all these rents together with the rent from the cafeteria at the basement were credited to the building account. The outgoings of the property, namely, property tax, quit rent and interest on the building loan, were debited to the building account and a net balance of rental over outgoings was then arrived at. In the balance sheet of the partnership business, City School-Arts, as at 31 December 1975, there appeared below the item of the capital account two separate items, namely: (i) excess of income over expenditure representing the net income from the business, and (ii) balance of building account representing the rental income. This accounting practice and treatment of the rental income from the property continued in subsequent years until the date of death of the deceased in 1980.

Thus far, there is no dispute between the plaintiff and the defendant. The dispute is centred on the receipt of the rental income from the property as from 1975 onwards to the date of death of the deceased. The case of the plaintiff is that the rental income from the property was shared between the deceased and Eric in the ratio of 60:40. She relies substantially on the evidence of one Leslie Christian who at all material times was employed

by the deceased as the group accountant to the various businesses carried on by the deceased as a sole proprietor and those carried on by the deceased in partnership with his children. Leslie Christian was responsible for the preparation of the books, records and accounts and also income tax returns of all such businesses. In support of the case for the plaintiff, Leslie Christian produced four volumes of the ledgers of the partnership business, City School-Arts, covering the period 1971 to 1980. He deposed to the fact that in the ledgers he wrote and kept a record of capital account of the partners, which he called the memorandum of capital account and which was written in pencil for each of the years 1971-80. The partners' shares of profits from City School-Arts each year were credited to their respective capital accounts. In respect of the year 1975 and subsequent years he said that the profits or rentals from the property were apportioned between the deceased and Eric in the ratio of 60:40 and the profits from the business, City School-Arts, were apportioned between the three partners, the deceased, Eric and Shirley in the ratio of 50:25:25, and the respective entitlements of the partners were credited to their capital accounts each year, and these were written by him in pencil in the memorandum of capital account in the ledger of each year.

Unfortunately, such accounting treatments of the profits or rentals from the property as reflected in the few pages of the ledgers of City School-Arts were not borne out by contemporaneous documents emanating from the deceased. In his income tax return for the year of assessment 1976, he reported that in 1975 he was in receipt of the rental of the property amounting to $161,084. This figure was the net amount of rents from the property, including the rents charged against the three businesses, less the outgoings for the year 1975. As a result of this information in his return, the Comptroller of Income Tax sought confirmation from the deceased whether he was the sole recipient of the rent from the property with effect from 1 January 1975. In response to this query the deceased in his letter of 11 August 1976 said: 'I confirm that I am the sole recipient of the rental with effect from 1 January 1975.' On that basis, an assessment to income tax was raised on the net rental he said he received. Similarly, in his income tax returns for the subsequent years of assessment, 1977, 1978, 1979 and 1980, he declared the net rental income from the property as his own income, and he was assessed to income tax on those incomes, and he paid the tax so assessed. Correspondingly, Eric in his return for the year of assessment 1976 and subsequent years omitted his share of rental income from the property, and consequently he was not assessed to tax on his share of rental income to which he claimed he was entitled.

In addition to the three partnership businesses, the deceased also carried on the following businesses in Singapore as a sole proprietor, namely, Stamford College and Languagephone Laboratories Institute. On 4 April 1979, in answer to a query from the Comptroller of Income Tax, the deceased disclosed that during the period 1973-77 he had in each year transferred sums of money to Stamford College from the accounts of the three partnership businesses and the accounts of his sole proprietorship, and the total net amounts so transferred were as follows: (i) $491,000 in 1973; (ii) $660,000 in 1974; (iii) $574,500 in 1975; (iv) $707,750 in 1976 and (v) $496,000 in 1977. Of these amounts, the following were transferred from the accounts of the three partnership businesses:

Year	*City School-Arts*	*City School-Science*	*Stamford Centre*	*Total*
1973	$290,000	$75,000	$120,000	$485,000
1974	$421,000	$85,000	Nil	$506,000
1975	$472,000	$40,000	$ 55,000	$567,000
1976	$342,000	$88,000	$158,000	$588,000
1977	$249,000	$71,000	$173,000	$493,000

Upon the death of the deceased, the Commissioner of Estate Duties in reliance on s 8(c) of the Estate Duty Act included as part of the dutiable estate of the deceased the 40% equitable interest in the property. This was objected to by the plaintiff, and the question is whether the 40% equitable interest was subject to estate duty.

The provisions of s 8(c) of the Estate Duty Act, in so far as relevant, are as follows:

> 8 Property passing on the death of the deceased shall be deemed to include the following property:
> (a) ...
> (b) ...
> (c) property taken as a ... or taken under any gift, whenever made, of which bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

Under these provisions the conditions of liability to duty occur if the person taking the gift does not immediately upon the gift assume bona fide beneficial possession and enjoyment of such gift and thenceforward retain such possession and enjoyment to the entire exclusion of the donor of such gift or of the benefit to him by contract or otherwise: see *O'Connor* v *Commissioner of Succession Duties (South Australia)*[1] at p 610. In determining whether such conditions of liability subsisted in this case, three questions fall to be considered, namely: (i) what was the subject matter of the gift? (ii) whether bona fide possession and enjoyment of the subject matter of the gift was assumed by Eric, the donee, immediately upon the gift, and (iii) whether bona fide possession and enjoyment of the subject matter of the gift had thenceforward been retained by Eric to the entire exclusion of the donor, the deceased, or of any benefit to him by contract or otherwise.

The first and second questions do not pose any problems in this case. The plaintiff and the defendant have agreed that the subject matter of the gift was the 40% equitable interest in the property, though it seems to me that it is more accurate to say that the gift was a 40% interest of the partnership which includes all the partnership assets, the principal one of which is the property. The plaintiff and the defendant have also agreed on the second question, namely, that bona fide possession and enjoyment of the subject matter of the gift was assumed by Eric immediately upon the gift being made. There remains only the third question, which is whether bona fide possession and enjoyment of the 40% equitable interest had thenceforward been retained by Eric to the entire exclusion of the deceased or of any benefit to him whether by contract or otherwise. That is the bone of contention between the plaintiff and the defendant.

Connected with this question is a further question whether the rents charged against the partnership businesses were actual or merely notional. In considering this question, it is necessary to divide the period of partnership into two: first, the period commencing from the date when Eric became a partner to 31 December 1974, and secondly, the period commencing from 1 January 1975 to the date of death of the deceased. In respect of the first period, there is no dispute between the plaintiff and the defendant. It is common ground that during this period the property was treated as the partnership property; it was taken into the account of City School-Arts as a partnership property, and though rents were charged against the other two businesses City School-Science and Stamford Centre, they were merely notional. The rents were charged for the purpose of determining more accurately the profitability of these businesses. The only rent collected during this period was the rent from the tenant of the basement which was used as a cafeteria.

In respect of the second period, the position was different. Under the partnership arrangement, Shirley, as from 1 January 1975, was not entitled to any part of the rents or profits from the property. As from that year, each of the businesses, City School-Arts, City School-Science and Stamford Centre, was charged a rent and these rents together with the rent from the basement were credited to the building account, and the net rental, after deduction of outgoings of the property, was reflected as a source of income in the balance sheet of City School-Arts for each year, from 1975-79. According to Leslie Christian the net balance of rental in the building account was in each year credited to the accounts of the deceased and Eric in the ratio of 60:40. The profits from the three partnership businesses less all expenses, including the rents charged, were divided between the deceased, Eric and Shirley in the ratio of 50:25:25. In respect of this second period, it is contended by Mr Bates on behalf of the plaintiff that it is not correct to say that rents were charged and paid out of the profits of each of the businesses; the rents were notional and the crediting of the rents to the building account had no effect or consequence on the overall partnership profits, but only on the distribution of the profits between the partners. The effect or consequence, he submits, is that the deceased and Eric had a prior claim to the profits of the partnership as against Shirley in that out of the profits an amount equal to the total of the notional rent was first distributed to the deceased and Eric in the ratio of 60:40 and the balance of the profits remaining were then distributed amongst the three of them in the ratio of 50:25:25. On the other hand, it is submitted by Miss Loo on behalf of the defendant that the rents charged against the three partnership businesses were actual rents. There were then three partners of the firm but only two were entitled to the rents from the property, and the partnership businesses were charged certain sums for use and occupation of the property; these were clearly reflected in the building account of City School-Arts as rents. Therefore rents were payable and were paid by the partnership. It seems to me that on either view the result is the same. Only the deceased and Eric were entitled to the rental income of the property in the proportion of 60:40, and this includes the amounts paid by or charged against the three partnership businesses for use and occupation of the respective parts of the property and the businesses were carried on by the three partners, the deceased, Eric and Shirley. Whether these payments were treated as prior claims of the deceased and Eric to the profits of the businesses as contended by Mr Bates or as rents paid by the partnership as contended by Miss Loo seems to me to be immaterial. The material fact is that these payments were actually charged to the accounts of the three partnership businesses respectively and they were paid out of the profits of these businesses, and the material question is really who received or enjoyed the benefit of these payments.

The deceased had during his lifetime treated these payments as rents paid by the partnership and had also treated these rents and the rent from the basement as being received solely by him. He confirmed in no uncertain terms that he was the sole recipient of all these rents, and in consequence he was assessed to income tax on these rents and he paid tax thereon. His accountant, Leslie Christian, had also treated these payments as rents in the partnership accounts, but he said that the proportionate shares thereof were credited by him to the capital accounts of the partners, the deceased and Eric, and he relied on the memorandum of capital account which he wrote in pencil in the ledgers of City School-Arts. I find what Leslie Christian said he did as odd and inexplicable. First, it puzzles me as to why he should keep and maintain the memorandum of capital account in the way he did; the manner in which the memorandum

of capital account was written up and kept is somewhat unusual. Secondly, Leslie Christian said that he worked very closely with the deceased and was familiar with the accountancy methods of the deceased. Yet what he did with regard to the entries he made to the capital accounts of the deceased and Eric for 1975 and subsequent years was completely at variance with what the deceased did. He did not say that what he did was known to and approved by the deceased. If the deceased had approved such capital accounts of the partners as written up and kept by Leslie Christian, then what he reported to the Comptroller of Income Tax was an untruth. Leslie Christian did not say also whether he knew or was aware that the deceased reported that he, the deceased, was the sole recipient of the rents. It seems to me unlikely that he was unaware of what the deceased did. According to him, he was responsible for the preparation of, inter alia, income tax returns of the three partnership businesses and the businesses conducted by the deceased as a sole proprietor. It is significant that in connection with the query from the Comptroller of Income Tax about the transfers of funds effected, which I have set out in some detail, he was familiar with the reply furnished by the deceased and sought to explain the circumstances in which the reply was given and the purpose and meaning intended by the deceased.

Mr Bates submits that the income tax returns and the confirmation furnished by the deceased to the Comptroller of Income Tax were wrong and in fact there were no rents received by the deceased. I am unable to accept this argument. With the benefit of hindsight it was perhaps wrong for the deceased to have done what he did. But what he did was his own choosing. He was an accountant, and probably an experienced accountant, and apart from practising as an accountant, he succeeded in establishing extensive and lucrative education and teaching businesses in the field of commerce. Obviously he was a very knowledgeable and able person, and he knew what he was doing. It might well be that at all material times, from his point of view, there were tax or other advantages in treating these payments, which were paid out of the profits of the partnership businesses, as rents, and declaring that he was the sole recipient thereof. What he did was deliberate and intentional, and as a matter of inference, he did that for certain reasons and not out of sheer ignorance. The factual situation which he himself created is irreversible, and it seems to me unarguable that in the circumstances no rent from the property whatsoever was paid solely to the deceased and that what he did was wrong and had no legal effect or consequence. In my opinion, on these facts, Eric had not during the period 1975 to the date of death of the deceased, retained bona fide possession and enjoyment of the 40% equitable interest in the property to the entire exclusion of the deceased.

There is yet another aspect of this case which also indicates that the deceased had during his lifetime trenched on the gift he made to Eric. To a query from the Comptroller of Income Tax in February 1979 the deceased disclosed that during the period 1973-77 he had transferred from time to time large sums of money from the accounts of the three partnership businesses to his own business, Stamford College. As I have said, the amounts of funds transferred were very considerable, and it may be helpful to compare the amounts so transferred from the account of City School-Arts alone with his credit balance in his capital account kept and maintained by Leslie Christian. According to Leslie Christian, the deceased's credit balance included the deceased's share of rental from the property. I have extracted from that account the following figures for comparison with the net amounts transferred from the account of City School-Arts:

Year		*Credit balance in capital account* $	*Net amount transferred from City School-Arts* $
Pre-1973	B/F	441,293.33	–
1973		171,269.52	290,000.00
	B/F	612,562.85	290,000.00
1974		198,490.14	421,000.00
	B/F	811,052.99	711,000.00
1975		214,921.71	472,000.00
	B/F	1,025,974.70	1,183,000.00
1976		177,041.77	342,000.00
	B/F	1,203,016.47	1,525,000.00
1977		183,001.45	249,000.00
	B/F	1,386,017.92	1,774,000.00

On these figures, it seems clear that the deceased in transferring the funds from the accounts of City School-Arts in 1975, 1976 and 1977 withdrew not only his credit balance in the capital account but also parts of the credit balance of Eric, and the credit balance of Eric, according to Leslie Christian, included Eric's share of the rental income from the property. The deceased's transfers of funds during this period for his own purpose, in my view, trenched on or diminished Eric's share of the rental income from the property.

It seems to me that the deceased, though he admitted his two children into partnership, Eric in 1971 and Shirley in 1973, was very much in control of the partnership businsses and the property. He treated certain partnership income as solely his own and made transfers of funds from partnership accounts to his own personal account as and when he deemed fit. Indeed, as a matter of inference, he was in full control of the businesses and affairs of the partnership. In this respect, this case is not dissimilar to *O'Connor* v *Commissioner of Succession Duties (South Australia)*[1] and *Commissioner of Stamp Duties of*

New South Wales v *Permanent Trustee Co of New South Wales*[2] where in each case the donor, after making the gift, at a subsequent stage exerted unfettered control over income from the gift.

In the *O'Connor* case[1] the donor gave to his son certain shares in companies and mortgages of real property, which at the time of the gift were held and looked after by a firm of solicitors acting for his son. Subsequently, these securities were taken out of the hands of the solicitors and placed with a bank in the locality where the donor resided. The donor then with the consent of his son received all the income from the securities and applied it for his own use without any objection from his son. Upon the death of the donor the question arose as to whether the gift was chargeable to duty under s 18(3) of the Succession Duties Act Further Amendment Act 1919 & 1923 (South Australia) and the provisions of that subsection were somewhat similar to s 8(c) of our Estate Duty Act. The High Court of Australia held that it was so chargeable as the son, the donee, had not subsequent to the gift retained beneficial interest and possession of the gift to the entire exclusion of the donor.

In the case of *Permanent Trustee Co of New South Wales*[2] the donor by a deed of settlement transferred to the trust company certain shares, property and investment in trust for his daughter's maintenance, education and general support until she attained the age of 30, and on her attaining that age to pay the whole of the trust fund with accumulation to her for her own use. The daughter attained the age of 30 but prior to that she wrote to the trustee company authorizing them to take instructions from her father in all matters regarding her trust and in a new account to be opened in her name which was eventually opened and to which were subsequently paid all moneys from the trust. She also authorized her father to operate the new account. The father on that authority withdrew funds from that account for his purposes without obtaining her approval. The daughter did not draw on that account or revoke the authority given to the father. On the death of the father, the Commissioner of Stamp Duties assessed to duty the value of the trust property as at the date of death under s 102(2)(d) of the Stamp Duties Act 1920-40, the relevant provisions of which were as follows:

> For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property:
>
> (2)(d) Any property comprised in any gift made by the deceased at any time whether before or after the passing of this Act of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died.

It was common ground that the sums withdrawn by the deceased from his daughter's account were to be regarded as loans made to him free of interest. The Full Court of the Supreme Court of New South Wales held that the sum representing the value of the trust property as at the material date was properly included in the dutiable estate. On appeal, the High Court of Australia by a majority reversed the decision. But on further appeal, the Privy Council allowed the appeal and restored the judgment of the Full Court. The main ground for holding that possession and enjoyment of the gift had not been retained by the daughter to the entire exclusion of the father was the absolute control by the latter over the income of the trust property and the bank account of his daughter, and the withdrawing of funds from that account for his own use. Viscount Simonds in delivering the judgment of the Board agreed with Dixon CJ that the father was 'master of the income as it was paid over by the trustee' and said, at p 525:

> ... He was, too, in a position to ensure that it was so paid over. His dual authority from his daughter, which enabled him on the one hand to direct the trustee how her money should be disposed of and on the other to deal with it when it reached the bank, placed him in a position of unchallengeable control, unless and until it was revoked. And it was not revoked. In these circumstances the conclusion is irresistible that the daughter, who at material times was the sole beneficiary under the settlement, did not retain bona fide possession and enjoyment of the trust property to the entire exclusion of her father or of any benefit to him. Here it does not seem that any nice question arises whether it was from the subject matter of the gift that the donor (the testator) was excluded or, alternatively, from any benefit, nor whether it is necessary that the benefit taken by the donor should impair the possession and enjoyment by the donee of the subject matter of the gift. For here the design and the result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income.

Later, in disposing of an argument that when the father drew on his daughter's account he was borrowing his daughter's money which had lost its identity as trust income and that he did not take it free from any obligation of repayment, Viscount Simonds said, at p 526:

> The transaction must be viewed as a whole and, since an integral part of it was that the testator before the account was opened was authorized to draw on it for his own purposes, it is irrelevant whether, when he did draw on it, he was or was not under any obligation to repay. Gift or loan, he for his own advantage used her money, paying no interest for it, and by so much reduced her enjoyment of what was her trust income and nothing else. The obligation to repay affected the quantum of the benefit obtained by him: it did no more.

Similarly, in the instant case, the deceased had 'unchallengeable control' over the rental income from the property; he was 'master of the income' as it was paid. He

arrogated to himself the right to receive the whole of the income and, on his own unequivocal confirmation, did receive and use it. When his own business, Stamford College, required funds, he transferred from time to time vast sums of money from City School-Arts to Stamford College and, as I have demonstrated, what he drew from City School-Arts far exceeded his credit balance in the capital account (assuming that the respective partners' shares of the rental income had been credited to his and Eric's accounts at the material time) and, in my view, he thus trenched on or impaired Eric's possession and enjoyment of the gift, ie the 40% equitable interest in the property.

In my view, in the circumstances, the Commissioner of Estate Duties was fully justified in including the subject matter of the gift as part of the dutiable estate of the deceased. With regard to the prayers in the originating summons, I agree with the defendant that there was no issue in prayer 1, as the Commissioner of Estate Duties agreed that the property was and is a partnership property. As for prayer 2, I am clearly of the opinion that in the circumstances that had happened estate duty was payable under s 8(c) of the Estate Duty Act on the 40% equitable interest in the property. The plaintiff will have to pay the costs of these proceedings.

Order accordingly.

Solicitors: *Cooma Lau & Loh & M Karthigesu.*

Reported by *PS Ranjan*

Lai Ah Kau & Anor v Public Prosecutor

HIGH COURT (SINGAPORE) – MAGISTRATE'S APPEAL NOS 81 & 82 OF 1984
CHUA J
6 SEPTEMBER 1988

Companies and Corporations – Moneys of company – Whether directors are trustees thereof – Whether person in total control of company by reason of shareholding and directorship is capable of stealing property of company – Drawing by shareholders of profits otherwise than by dividend – Whether dishonest – Whether fraud committed on company – Companies Act (Cap 50, 1985 Ed), ss 157(1) & 199(1)

Criminal Law – Criminal breach of trust – Moneys of companies paid out as fictitious contractual payments to subcontractor – Finding of dishonesty in relation to the revenue – Whether there was also wrongful loss to the companies – Penal Code (Cap 103, 1970 Ed), ss 34, 405 & 409

The appellants, who were directors and shareholders of certain companies, implemented a scheme to withdraw money from the companies for the purpose of an earlier withdrawal and distribution of their expected profits otherwise than in the proper way by declaring dividends. The scheme involved the use of fictitious contracts and vouchers by which moneys purportedly to pay a subcontractor's bills were drawn out and paid eventually to the appellants. The magistrate who tried the case found that the exercise of withdrawing the funds from the companies was dishonest and also found that there was dishonesty on the part of the appellants in relation to the Revenue in that they evaded payment of income tax on the disguised payments. Both appellants were convicted of several charges of criminal breach of trust and abetment of criminal breach of trust in respect of transactions arising out of the scheme.

The issues raised in the appeals were: (1) whether the appellants did misappropriate the property of the companies within the meaning of s 405 of the Penal Code; and (2) if they did, whether they did so dishonestly within the meaning of s 405 of the Code.

It was submitted for the appellants that the finding of dishonesty vis-à-vis the Revenue was not the requisite finding of dishonesty required by s 405 of the Code for criminal breach of trust because what had to be found was dishonesty vis-à-vis the company. It was further submitted that there was no misappropriation because: (1) there was no intention on the part of the appellants to cause wrongful loss to the companies as the appellants did not consider their companies to be 'other persons'; and (2) there was no intention on the part of the appellants to cause wrongful gain in relation to the companies as the money taken represented profits and as shareholders the appellants honestly believed that they were entitled to take the money as profits.

Held, dismissing the appeals:

(1) The directors of a company are trustees as to the moneys of the company which come to their hands or under their control and can be proceeded against for misapplication of the funds of the company.

(2) A person in total control of a limited liability company, by reason of his shareholding and directorship is or, two or more persons acting in concert, are capable in law of stealing the property of the company.

(3) The defence that the sums taken out represent 'profits' was untenable. The act of appropriation was dishonest. The appellants had caused wrongful loss to the companies in that the companies had paid out various sums of money as contractual payments when there were no such contracts. If these sums were to be taken as profits, the proper procedures in the Companies Act had to be followed. By secretly taking out these large sums of money for themselves, the appellants as agents of their companies had committed fraud on their own companies. In disguising these payments as payments to subcontractors, the appellants had not only caused wrongful loss to their respective companies but they had also caused wrongful gains to themselves. Had the accounts been properly audited and a profit and loss account put up, their entitlements would have been less than what they had arrogated to themselves.

Cases referred to

1 *R* v *Arthur* [1967] 111 SJ 435 (folld)
2 *Attorney General's Reference (No 2 of 1982)* [1984] 2 All ER 216 (folld)
3 *Belmont Finance Corporation Ltd* v *Williams Furniture Ltd* [1979] 1 All ER 118 (folld)